

Message

From: Cope, Ben [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=497EFADD936E4D378225116B8F50FD3F-COPE, BEN]
Sent: 2/24/2015 10:59:03 PM
To: Cox, Michael [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cddd6a5bb3c2477183799ef56cdb464f-Cox, Michael]
Subject: Re: summary of CBD decision

The complaint was publicized but maybe that was due to CBD contact with the press. Since they lost the case, they probably won't contact the press so maybe this one goes quietly.

From: Cox, Michael
Sent: Tuesday, February 24, 2015 1:54 PM
To: Cope, Ben
Subject: RE: summary of CBD decision

You are on top of things that is for sure. As I understand is that Jill is working on a short statement we can use. However, given that no one has called at this point indicates to me that we will probably not hear from anyone, but just in case.

Michael Cox
Office of Environmental Assessment
US EPA Region 10, 1200 Sixth Avenue, Suite 900
Seattle, WA 98101
206-553-1597
cox.michael@epa.gov

From: Cope, Ben
Sent: Tuesday, February 24, 2015 11:15 AM
To: Cox, Michael
Subject: Re: summary of CBD decision

Hey Mike, welcome back. Do you think we are ready for press calls on this? We got subtleties to deal with..

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

-BC

From: Cox, Michael
Sent: Tuesday, February 24, 2015 10:58 AM
To: Allnutt, David; Anderson-Carnahan, Linda; Bonifaci, Angela; Bonifacino, Gina; Brown, Cheryl A.; Cope, Ben; Cora, Lori; Cox, Michael; Croxton, Dave; Davis, Michelle V.; Dunbar, Bill; Duncan, Bruce; Eaton, Thomas; Fullagar, Jill; Kelly, Joyce; Labiosa, Rochelle; Lohrman, Bridgette; Mlsna, Ivy; Nelson, Walt; Olsen, Tony; Pacella, Stephen; Rappoli, Brian; Reichgott, Christine; Szelag, Matthew; VanHaagen, Paula
Subject: FW: summary of CBD decision

Thanks Jill.

Michael Cox
Office of Environmental Assessment
US EPA Region 10, 1200 Sixth Avenue, Suite 900
Seattle, WA 98101
206-553-1597
cox.michael@epa.gov

From: Fullagar, Jill
Sent: Tuesday, February 24, 2015 10:51 AM
To: Opalski, Dan; Psyk, Christine; Cox, Michael; Chellis, Tracy; Carlin, Jayne; Croxton, Dave; Henning, Alan; Henszey, Jo; Livingstone, Gail; Mann, Laurie; Jacobson, Martin; Ramrakha, Jayshika; Rueda, Helen; Schary, Claire; Stewart, William C.; Turvey, Martha; Woodruff, Leigh; Wu, Jennifer
Subject: FW: summary of CBD decision

Hi all,

Here is DOJ's summary of the CBD ocean acidification lawsuit decision. I read it as well and it was very favorable, and heavily cited our decision documents. Let me know if you have any questions about it. Thx.

jill

Jill Fullagar, Impaired Waters Coordinator
Watershed Unit, Office of Water and Watersheds
US EPA, Region 10
1200 Sixth Avenue, Suite 900 (OWW-192)
Seattle, WA 98101-3140
(206) 553-2582, (206) 553-1280 (fax)
fullagar.jill@epa.gov

From: Morris, Cynthia (ENRD) [<mailto:C.J.Morris@usdoj.gov>]
Sent: Tuesday, February 24, 2015 10:26 AM
To: Sweeney, Stephen; Cora, Lori; Fullagar, Jill
Subject: summary of CBD decision

On February 19, Judge Robart (W.D. Wa.) issued a favorable decision in the case of *Center for Biological Diversity v. EPA*. The case involved an APA challenge to EPA's approval of Washington's and Oregon's CWA section 303(d) lists of impaired waters based on the failure of the states to list coastal and estuarine waters as impaired for ocean acidification. In a 70-page Order, the court concluded that CBD had standing to challenge EPA's decisions (an issue not raised by the United States) and denied the CBD motion for summary judgment and granted the United States' motion for summary judgment, and granted in part and denied in part our motions to strike extra record materials submitted to the court and relied upon by plaintiff and in amici briefs.

With respect to the motions to strike, the court recognized the general rule that judicial review is to be based on the administrative record certified by the agency and presented to the court, but also recognized exceptions to the rule. The court rejected the argument of amici that certain extra-record information should be considered to explain complex subject matter, finding that the additional information submitted would be cumulative of the extensive administrative record already before the court, and thus unnecessary. The court also rejected post-decisional information offered by amici, recognizing that the information was not presented to clarify or explain the agency's decision as asserted but, rather, was referenced to advance a substantive rationale for overturning the agency's decisions. Finally, the court denied the motion to strike certain extra-record data that were offered to show that the agency failed to consider all relevant factors. However, the court accepted the data for the limited purpose of showing

that the data were available to the states and to EPA at the time they made their respective decisions and that the data may provide evidence of violation of the states' water quality standards; but the court declined to consider the extra-record data to determine the correctness or wisdom of the agency's decision, and did not consider the substantive arguments advanced by CBD and amici based on that extra-record data. Ultimately, the court concluded that the state did consider the data, and that the state provided a reasonable explanation for its decision to not rely upon the data, and that EPA reviewed the state's explanation and deemed it reasonable – and that nothing more is required of EPA.

With respect to the merits, CBD had argued that evidence before the agency demonstrated violations of Washington's numeric pH standard, and both states' narrative standard for protection of aquatic life uses. With respect to the numeric pH standard, the court concluded that Washington provided a reasonable explanation for its decision not to list certain waters as impaired based on data that CBD argued provided evidence of a violation of the numeric standard for pH, and further concluded that EPA was justified in accepting the state's explanation and in relying upon the analysis of its own experts. With respect to the narrative standards, the court found the EPA offered a reasonable explanation for its conclusion that the evidence before it did not justify a finding of impairment, and the court found that EPA offered a rational connection between the facts found and the choices made. In all of its findings, the court relied heavily upon the agency's decision documents, and granted a high degree of deference to EPA's technical and scientific expertise, relying on existing 9th Circuit authority.